No. 22,012

United States Court of Appeals

For the Ninth Circuit

POTRERO HILL COMMUNITY ACTION COMMITTEE, an unincorporated association, MARINE HAMILTON, RUTH FLOWERS, etc., et al.,

Appellants,

vs.

THE HOUSING AUTHORITY OF THE CITY AND COUNTY OF SAN FRANCISCO,

Appellee.

BRIEF FOR APPELLEE

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STATEMENT OF QUESTIONS PRESENTED

I. Does Appellants' complaint state a claim upon which relief may be granted by the Federal District Court?

II. Does this action present a question arising under the laws of the United States or is it in any other way within the jurisdiction of the Federal District Court?

III. Is there a lack of jurisdiction by reason of the amount in controversy being less than $10,000.00, exclusive of interest and costs?

IV. Are the judgments between the same parties and involving the same property which have been entered by the Municipal Court of the City and County of San Francisco such as to be res judicata as to the Federal District Court?

STATEMENT OF CASE

Appellee does not controvert the Statement of Case presented in Appellants' Brief.

SPECIFICATION OF ERROR RELIED ON

Appellee controverts Appellants' Specification of Error Relied On. Appellee feels that the District Court erred in not granting Appellee's motion to dismiss Appellants' complaint on the ground that said Court lacks jurisdiction over the subject matter herein.

SUMMARY OF ARGUMENT

1. Appellants' complaint fails to state a claim against Appellee upon which relief can be granted by the Federal District Court.

2. The Federal District Court has no jurisdiction over the subject matter for the reason that the action is between parties who are citizens of the same State, and the action presents no question arising under the Constitution or laws of the United States, nor is it otherwise within the jurisdiction of the Federal District Court.

3. The Federal District Court lacks jurisdiction over the subject matter for the reason that the amount in controversy is less than $10,000.00, exclusive of interest and costs.

4. The Federal District Court lacks jurisdiction over the subject matter for the reason that the Municipal Court of the City and County of San Francisco, State of California, in unlawful detainer actions involving each of the individual Appellants, and regarding the same property, has taken jurisdiction and entered judgments in said actions in favor of Appellee and against each of the individual Appellants, and said judgments have become final.

ARGUMENT

I

APPELLANTS' COMPLAINT FAILS TO STATE A CLAIM AGAINST APPELLEE UPON WHICH RELIEF CAN BE GRANTED BY THE FEDERAL DISTRICT COURT.

The Court below perceptively stated on page 3 of its Opinion:

> "The decisive issue before this Court is whether the violations of the sanitation and safety requirements set forth first in the declaration of policy in 42 U.S.C. § 1401 and again in the contract between the Public Housing Administration and the Housing Authority, gives the plaintiffs (Appellants) the right to bring a civil action in the federal courts for injunctive relief."

Both Appellants and Appellee recognize that the questions of jurisdiction of a federal question and the

failure to allege a claim on which a Federal Court can grant relief, are closely related. Under this part of Appellee's argument, reference will be made only to the argument that Appellants have not stated a claim upon which relief can be granted by the Federal District Court.

In the order of the Court below granting Appellee's motion to dismiss, the Court correctly analyzed the U. S. Housing Act of 1937, as amended, and as contained in 42 U.S.C. §§ 1401-1436. These statutes are the primary basis upon which Appellants urge that a claim has been stated upon which relief can be granted. On page 3 of the Opinion of the Court below, it is accurately stated:

> "Nowhere in the Low-Rent Housing Act is there a statute expressly conferring a remedy of this nature for persons in plaintiff's (Appellants') position".

The Court correctly determined that this is not a case where a civil remedy should be implied, and distinguished this case from those which Appellants cited for that proposition at the time of the hearing on the motion to dismiss and in Appellants' brief herein. The Court below correctly determined that what is to be considered sufficiently safe and sanitary in given situations was an area of discretion left to the Public Housing Administration and that Congress had specifically made the existing standards flexible because of the need for discretion to be exercised.

Appellee heartily concurs with the Court's statement that Appellants' contract rights are adequately

protected by the State cause of action in the State Courts. For this reason, implying a federal remedy giving private persons the right to enforce provisions contained in a declaration of Congressional policy in the Housing Act, is not appropriate in this case, nor is it necessary since under the Federal law the remedy involves the exercise of discretion which is better left to the Public Housing Administration. Appellants herein have an appropriate remedy under the law of the State of California in the event that the Appellee has breached its contract with Appellants. As a matter of fact, Appellants' second cause of action is simply a statement of their claim to relief which would be appropriately theirs if this action had been brought in the State Courts, in the event their factual allegations can be proven.

The California Health and Safety Code, § 34201(c), does provide that the legislative policy is the

> ". . . providing of safe and sanitary dwelling accommodations for persons of low income . . ."

Section 34212(b) of the same Code provides that the purpose of providing housing projects is,

> "To provide decent, safe and sanitary urban or rural dwellings, apartments, or other living accommodations for persons of low income . . .".

In Appellants' second cause of action they allege that their contracts with Appellee incorporate by reference these sections. Whether or not this is so, Appellee agrees that those sections are applicable to the dwellings in which Appellants reside. This proves Appellee's point that the Appellants' complaint does

not state a claim upon which the Federal District Court can grant relief, but states a claim upon which relief can and should be granted, if the facts alleged are true, in the Courts of the State of California where the action is between two citizens of that State.

Appellants concede on page 17 of their brief that Appellee correctly pointed out below that the Housing Act declares that the Federal policy is to vest maximum responsibility for the administration of the program in local authority, and in fact declares:

> "It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including the responsibility for the establishment of rents, eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this Chapter while effecting economies." (See 42 U.S.C. § 1401.)

In the many years since passage of this Act, if Congress felt that its purpose was being thwarted, or that a change in this policy could better carry out Congressional intent, it would have provided for a specific remedy of the nature Appellants are attempting to claim, and in fact would have specifically given a person in the position of any of the individual Appellants a right to bring an action in Federal Court to obtain the relief sought by Appellants herein. It is clear that this was not done, and Appellee states emphatically that logic tells us that Congressional intent was that the program could best be carried out by giving the local agencies maximum authority

and by the determination of any legal disputes arising between the Agency and its tenants in the State Courts.

Appellants state the issue as one of determining the propriety of implying a federal cause of action, and although Appellee feels this question is answered by the statements made above, some comment should be made about Appellants' analysis.

Appellants state that the implication of the federal cause of action and the decisions implying such, belong in two general patterns. One is where the defendant has a clearly definable duty subject to a criminal prosecution for its violation, and the second instance is in those cases where in the words of Appellants, a "judicially created federal common law" places a duty upon the defendant with an intention to benefit the plaintiff. Appellants must agree with the Court below in its opinion wherein it distinguished the cases cited involving criminal statutes from the present case which Appellants attempt to bring under their authority because the present case seeks to be brought under the general statement of Congressional policy to assist the states in remedying unsafe and unsanitary housing conditions through the use of public funds under 42 U.S.C. § 1401. The cases cited by Appellants are all cases involving railways (*Texas & Pac. Ry. Co. v. Rigsby,* 241 U.S. 33 (1916)), airline cases (*Wills v. TWA,* 200 F.Supp. 360 (1961)), labor cases (*Machinists v. Central Air Lines, Inc.,* 372 U.S. 682 (1963)), and *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957)) or cases involving

a violation of the United States Constitution (see *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180 (1921)).

Appellee agrees with Appellants that cases in these fields do properly present a claim upon which a Federal District Court can grant relief, either because of the specific statute involved, because there is a Constitutional question, or because the nature and effect of Congressional and judicial scrutiny has been to require a policy to make the law national and uniform in all areas and in order to effectuate this uniformity, the Federal Courts must implement any gaps. See *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957).

In summary, Appellee does not deny that Appellants, if the facts they allege in their complaint are proven true, have a claim upon which relief may be granted. Appellee's position is that this is not a claim upon which relief may be granted in the Federal District Court, but one upon which relief should be granted in a State Court. All of the arguments made in Appellants' brief have certainly been known to Congress and yet Congress has been unwilling to amend the Act to provide for private civil actions by individuals or groups of individuals residing in housing projects. As a matter of fact, Congress has not amended the Act to provide for such actions because they are satisfied that this program is one which, to be successful, must be locally managed and that any legal problems arising at the local level should be resolved by the State Courts. Appellants each have a contract with Appellee under

which they occupy the premises in which they reside. If this contract has been violated by Appellee either specifically or when read in conjunction with the Health and Safety Code provisions of the State of California referred to herein, Appellants' right of action lies in the State Court for a breach of that agreement or violation of state statute and does not lie in the Federal Courts for a claimed breach of the general purpose clause of a Congressional Act.

II

THE FEDERAL DISTRICT COURT HAS NO JURISDICTION OVER THE SUBJECT MATTER FOR THE REASON THAT THE ACTION IS BETWEEN PARTIES WHO ARE CITIZENS OF THE SAME STATE, AND THE ACTION PRESENTS NO QUESTION ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES, NOR IS OTHERWISE WITHIN THE JURISDICTION OF THE FEDERAL DISTRICT COURT, AND BECAUSE THERE IS NO FEDERAL QUESTION.

Appellee must respectfully differ from the determination of the lower Court that Appellants' complaint should not be dismissed for lack of jurisdiction. Appellee believes the Appellants' action presents no question arising under the Constitution or laws of the United States, nor is it otherwise within the jurisdiction of the Federal District Court. The District Court decision on jurisdiction followed what it viewed to be the approach of *Bell v. Hood,* 327 U.S. 678 (1945), after it determined that Appellant's claim was neither insubstantial nor wholly frivolous. The cases are distinguishable. In the *Bell* case, the plaintiffs sought recovery for a claimed violation of the

Fourth and Fifth Amendments to the United States Constitution. The Court stated, on page 681,

> "It cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis of this suit."

It is important to note the distinction that in that case recovery was sought for violation of constitutional rights, while in this case there is no constitutional question, but simply a question of whether or not contract provisions have been violated. The Court went on to state an exception to the general rule to be that when a claim under the Constitution or federal statute is immaterial and just for the purpose of obtaining jurisdiction, the general rule is not followed. Appellee points out that certainly something more is required than, as Appellants state on page 5 of their brief:

> "In other words, if the plaintiff plainly and seriously asserts he claims a right under federal law, this assertion suffices to establish federal jurisdiction under 28 U.S.C. § 1331."

Certainly the mere assertion of a right under federal law does not in and of itself grant federal jurisdiction.

In Appellants' complaint, it is alleged that this is an action arising under federal law and therefore involves a federal question within the purview of 28 U.S.C. § 1331. Jurisdiction is not obtained simply by an assertion of jurisdiction on the part of a plaintiff. It has long been held, although the doctrine has been liberalized, that in "federal question" cases, the Dis-

trict Courts must find their jurisdiction in expressed provisions of federal statute. *Sheldon v. Sill,* 49 U.S. 1441 (1850), and,

> ". . . the jurisdiction of these courts (Federal District Courts) is a limited one and that in every case jurisdiction depends solely upon congressional statute for its existence." Federal Civil Practice, California Continuing Education of the Bar (1961), page 12.

Federal Courts are still Courts of limited jurisdiction and have jurisdiction only over such matters as Congress has validly conferred upon them. 1 Moore's Federal Practice 602.

> "Due regard for the rightful independence of state governments which should activate federal courts requires that they scrupulously limit their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta,* 292 U.S. 263, 270 (1934).

In this case there is no grant of jurisdiction in the Public Housing Act cited by Appellants (42 U.S.C. §§ 1401-1436), and statutes conferring jurisdiction on the Federal Courts must be strictly construed. *Healy v. Ratta,* 292 U.S. 263, 270 (1934). Additionally, in this case there is no grant of federal jurisdiction in the Judicial Code (28 U.S.C. § 1337 through § 1340), nor is there any "federal question" jurisdiction authorized in any statute outside the Judicial Code. The burden of establishing jurisdiction rests on the Appellant as the person who has alleged jurisdiction. *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178 (1936).

Appellants claim their action arises under the United States Housing Act, 1937, contained in Chapter VIII of Title 42, U.S.C. § 1401 through § 1436, and therefore an examination of these sections should be made to determine whether they grant any jurisdiction to the Federal District Court over the subject matter herein. Appellants specifically refer to 42 U.S.C. § 1401 which is only a declaration of the policy of Congress. It states that this policy is to assist the states and their political subdivisions to provide housing for families of low income, and provides that it is the policy of the United States to vest in the local housing agencies the *maximum amount of responsibility* for the *administration* of the program. No civil remedies are provided within the Act with regard to occupants of such housing, nor is any Federal District Court jurisdiction conferred. In fact, the Act provides that such housing is to be developed and administered by the state or state agency under the applicable laws of the state. 42 U.S.C. § 1402(11). The Act provides a definition of the term "administration" as it is used in terms of delegating to the local housing authority administration of the program, as meaning "all undertaking necessary for management, operation, maintenance of financing subsequent to physical completion" of such projects. 42 U.S.C. § 1402(6). The Act also provides that any actions by the local public agency administering the housing projects to proceed to recover possession of any housing accommodations operated by it shall be pursuant to state statute and regulation. 42 U.S.C. § 1404(a). It is the contention of the Appellee that the United

States Housing Act of 1937 confers no jurisdiction upon the Federal District Court in an action of the nature brought here and, in fact, clearly states Congressional intent that there is State Court jurisdiction in a matter such as this, not Federal Court jurisdiction.

The claims of Appellants herein are claims which should be made under the laws of the State of California, as alleged in Appellants' second cause of action since they are matters governed by the leases entered into between the Appellants and Appellee. Appellants seem to recognize this fact by their reference to the California Health and Safety Code, §§ 34201 and 34212 in paragraphs XIV and XVIII of their complaint. This case is simply a controversy between tenants and a landlord who happens to be a state agency, and must be governed by state law. Jurisdiction over any controversies exists in the State Courts, not in the Federal District Court.

Only those allegations which are essential and necessary to Appellants' claim should be looked at in determining "federal question" jurisdiction. *Marshall v. Desert Properties Co.,* 103 F. 2d 551 (9th Circuit, 1939). The essential requirement is not that there be a *question* of federal law but that there be a *claim* under federal law. See Mishkin: "The Federal Question in the District Courts", 53 Colum.L.Rev. 157 (1953). The claim of the Appellants in this matter is an attempt to bring an action under a general declaration of policy by Congress. It is not a claim under federal law or even a question under federal

law, but involves the rights of a tenant against a landlord. The federal law by which Appellants seek to confer jurisdiction must be a substantial element of a claim, not indirectly involved, as it is here. *Moore v. Chesapeake & Ohio Railway,* 291 U.S. 205 (1934).

A claim must be founded directly upon federal law in order for there to be jurisdiction in a Federal District Court, for the action cannot be regarded as one arising under the laws of the United States where the federal right attempted to be asserted is actually of incidental or collateral relationship only, or even if direct, if it is clearly not possible for it to be substantially affected by the results of litigation. *Mudd v. Teague,* 220 F. 2d 162 (1955).

Appellants cite the case of *Smith v. Kansas City Title and Trust Co.,* 255 U.S. 180 (1921) as formulating the jurisdictional standard in terms of whether the complaint raises issues which depend for their outcome upon construction of federal law. In that case there was no question of jurisdiction raised by the parties, but in any event, Appellee believes the key word in the above statement is *"depend".* As previously stated, the state law provides an adequate remedy between two citizens of the same state, and therefore in the present case, the outcome sought by Appellants does not "depend" upon construction of the federal law. In the *Smith* case, as in other cases previously referred to, the factual situation involves a question of the constitutionality of an act of Congress, which is not present in this case.

In order for there to be jurisdiction, the suit must arise under the law of the United States, and a suit arises under the law that creates the cause of action. See *American Well Works Co. v. Layne and Boler Co.,* 241 U.S. 257, 260 (1916). That is not true here.

Appellants raise what they call substantial issues of federal law, but Appellee feels that this is an incorrect characterization. Under the same reasoning, all disputes between tenants and housing authorities would be brought within the jurisdiction of the Federal Courts. Is the Federal District Court to be the judge of allegations by tenants that too much or too little heat is provided, that buildings should be painted every three years rather than every five or ten, that refrigerators or stoves are to be of one size or another? Appellee does not believe so.

Under Appellants' line of reasoning, any suits for eviction should be brought in Federal Court but, as previously stated, the Housing Act specifically provides that they are to be brought in State Courts and provides that maximum power of administration is given to the local agencies. By reading the Act, one must conclude that Congress did not intend the Federal District Court to have jurisdiction over disputes between tenants and local agencies, but intended these differences to be resolved at the local level in the local State Courts.

Appellants contend that their claim is analogous to the claim put forth in *Machinists v. Central Air Lines,* 372 U.S. 672 (1963). Appellee sees no analogy

between the cases. The case cited by Appellants is one in which the Supreme Court said that the contract was to be viewed as part of the statutory scheme of the Railway Labor Act and the Court's interpretation had to be a matter of federal law because the rights and duties were created by federal law and federal law created the cause of action. As previously stated in this brief, this case involved that area of activity such as interstate commerce matters or labor law regulation which requires uniform national law enforcement as to validity, interpretation and enforcement. The subject matter calls for uniformity. Despite Appellants' contentions, this is not true in the public housing cases, for Congress has stated in the Act that maximum authority is granted to the local agency in the administration of the housing projects. As the lower Court indicated in its opinion, there is a substantial area of discretion appropriately left to the Public Housing Administration and to the local Authority and any remedy sought under the Housing Act would involve judicial infringement upon a proper Congressional delegation of discretion to the Public Housing Administration and to the local agency in order to implement Congressional intent in this program. As stated by the lower Court on page 6 of its opinion,

> ". . . plaintiff's contract rights are adequately protected by any existing state cause of action in the state courts."

Appellee contends that the Federal District Court has no jurisdiction over the subject matter herein, and

it almost requires no citation of authority to state that a Federal Court with no jurisdiction over the subject matter is without power or authority to proceed and must dismiss plaintiff's complaint. *Jackson v. Kuhn,* 254 F. 2d 555 (1958). It is fundamental that the lack of jurisdiction over the subject matter cannot be waived nor can it be created by stipulation and that without jurisdiction over the subject matter, the Court must dismiss the complaint. *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940).

III

THE FEDERAL DISTRICT COURT LACKS JURISDICTION OVER THE SUBJECT MATTER FOR THE REASON THAT THE AMOUNT IN CONTROVERSY IS LESS THAN $10,000.00, EXCLUSIVE OF INTEREST AND COSTS.

The Court below reached a decision that the complaint should be dismissed for failure to state a claim upon which relief can be granted and therefore did not reach this argument raised by Appellee. Nevertheless, Appellee seriously contends that this ground is sufficient independent reason for granting Appellee's motion to dismiss Appellants' complaint. It is elementary that in actions alleged to arise under federal law, the amount of controversy must exceed the sum or value of $10,000.00, exclusive of interest and costs. 28 U.S.C. § 1131(a).

The matter in controversy in this case, even if Appellants were allowed to aggregate their claims, does not put into controversy an amount exceeding the

$10,000.00 minimum. In any event and more importantly, Appellee contends that Appellants are not permitted under the law to aggregate their claims. Appellant contends that the 1966 revision to Rule 23, F.R.C.P. did away with the distinction between "true" and "spurious" actions, and that there is now only one class action based upon the requirement that the class be numerous, that common issues be presented, that the claims of the representatives be typical and that the representatives will protect the interests of the class. Appellee agrees that the former distinctions have been modified and that Appellants correctly state the revision to Rule 23. However, Appellee disagrees with Appellants' contention that it is reasonable to assume that said revision was intended to entirely eliminate the distinction between true and spurious class actions for purposes of aggregating claims to reach jurisdictional requirements. There is no statement in the revision to that Rule which does away with the difference for the purpose of aggregation of claims. The revision may have the effect of eliminating any distinction as to subject matter or common position, but not as to the amount in controversy. A review of the notes of the Advisory Committee on Rules following Rule 23, does not indicate that there is any change with regard to the rule not allowing aggregation of claims in a case such as this for purposes of reaching the required amount in controversy.

There is also nothing in the revision to Rule 23 which in any way overrules previous cases referring

to this point. Research by Appellee has resulted in the finding of two cases which are very similar on their facts to the case presently before the Court in this matter. In *Koster v. Turchi,* 173 F. 2d 605 (1949) tenants of a housing project, on behalf of themselves and some three hundred others, contested rent increases of more than $250.00 a year apiece, on the ground they were deprived of due process. The Court held that the increases of rentals of each tenant were separate causes of action and could not be joined to produce the jurisdictional amount.

In *Miller v. Woods,* 185 F. 2d 499 (1950), a group of tenants in housing projects in Los Angeles sued the Housing Expediter to enjoin him from terminating federal rent control in Los Angeles. The Federal District Court in that matter dismissed the complaint for lack of jurisdiction of the subject matter and for failure to state a claim. On appeal, it was held that the jurisdictional amount was not present and that the claims could not be aggregated to confer jurisdiction on the Court.

In the present case, the Court has no jurisdiction over the subject matter herein, because the amount in controversy is insufficient.

IV

THE FEDERAL DISTRICT COURT LACKS JURISDICTION OVER THE SUBJECT MATTER FOR THE REASON THAT THE MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, IN UNLAWFUL DETAINER ACTIONS INVOLVING EACH OF THE INDIVIDUAL APPELLANTS, AND REGARDING THE SAME PROPERTY, HAS TAKEN JURISDICTION AND ENTERED JUDGMENTS IN SAID ACTIONS IN FAVOR OF APPELLEE AND AGAINST EACH OF THE INDIVIDUAL APPELLANTS AND SAID JUDGMENTS HAVE BECOME FINAL.

It has long been held that a judgment between the same parties and regarding the same property which is obtained in a State Court is res judicata as to a Federal Court. *McClellan v. Carland,* 217 U.S. 268 (1910). The Court below by reason of the basis upon which it reached its decision, did not consider the ground of Appellee's motion that there was a lack of jurisdiction because of the pending actions over which the Municipal Court of the City and County of San Francisco, State of California, had obtained jurisdiction. Appellee acknowledges that such a motion to dismiss by reason of pendency of similar actions in a state is addressed to the discretion of the District Court, which should consider whether the other suits pending will necessarily determine the controversy between the parties. See *Highway Insurance Underwriters v. Nickols,* 85 F. Supp. 527 (1949).

Appellants claim that unlawful detainer actions filed in a Municipal Court are not res judicata because res judicata only operates to bar relitigation of a single cause of action. They further state that under California State Law, unlawful detainer is a

summary possessory action which is very limited as to the issues which may be litigated. It is submitted by Appellee that the appropriate remedy for the Appellants, when an unlawful detainer judgment was obtained against them, was to appeal said judgment to the highest Court of the State and thence, if the judgments were sustained against the claims raised in this action, to apply to the U. S. Supreme Court. This is the process which was followed in an identical action in *Thorpe v. Housing Authority of the City of Durham,* 87 S.Ct. 1244 (1967). It is submitted that Appellants herein could have asserted the rights they are raising in this action and since they had the opportunity to raise those rights in the State Court action, and did not do so, they are unable to raise them now.

For the information of the Court, each of the individual Appellants herein has had a final judgment rendered against him in the Municipal Court of the City and County of San Francisco, State of California and in favor of Appellee for unlawful detainer.

CONCLUSION

For the above reasons the Court should sustain the District Court's order to dismiss Appellants' complaint, both on the ground that there is a failure to state a claim upon which relief can be granted, the ground stated by the Court and in addition, because the Federal District Court lacks jurisdiction over the subject matter.

Dated, San Francisco, California,
October 16, 1967.

DONALD B. KING,
Attorney for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD B. KING,
Attorney for Appellee.